No. 18-315

In the Supreme Court of the United States

COCHISE CONSULTANCY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. BILLY JOE HUNT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

The False Claims Act, 31 U.S.C. 3729 *et seq.*, contains a six-year statute of limitations and a tolling provision for any "civil action under section 3730." 31 U.S.C. 3731(b). The tolling provision permits a suit to be brought within three years after "the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed." 31 U.S.C. 3731(b)(2). The questions presented are as follows:

1. Whether the tolling provision in 31 U.S.C. 3731(b)(2) applies to a civil action brought by a private relator under 31 U.S.C. 3730(b) when the United States elects not to intervene in the action.

2. Whether, for purposes of 31 U.S.C. 3731(b)(2), a private relator is "the official of the United States charged with responsibility to act under the circumstances" when the United States elects not to intervene.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 8
Argument:
I. Section 3731(b)(2) applies to a relator's action under Section 3730(b) even if the United States declines to intervene in the action 11
A. The text of Section 3731(b) does not distinguish among FCA suits commenced by the United States, qui tam suits in which the United States intervenes, and qui tam suits in which the United States declines to intervene 12
1. A civil action brought by a relator for a violation of Section 3729 is "[a] civil action under section 3730" 13
2. This Court's decision in *Graham County* confirms that Section 3731(b)(2) applies to this case 14
3. Petitioners' textual arguments lack merit 17
B. The structure, purpose, and history of the statute confirm that Section 3731(b)(2) applies even when the United States declines to intervene 20
1. Where the FCA distinguishes between relators and the government, it does so clearly 21
2. Petitioners' reading would frustrate the purpose of the tolling provision 23
3. The legislative history of the statute supports giving effect to its plain meaning 24
C. Petitioners' policy concerns are unfounded 25

Table of Contents—Continued: Page

II. Under Section 3731(b)(2), a private relator is never "the official of the United States" whose knowledge of fraud triggers the commencement of the three-year tolling period 27
Conclusion 32

TABLE OF AUTHORITIES

Cases:

American Pipe & Constr. Co. v. *Utah*, 414 U.S. 538 (1974) 26
Bailey v. *Glover*, 88 U.S. (21 Wall.) 342 (1875) 23
Bankamerica Corp. v. *United States*, 462 U.S. 122 (1983) 17
Bierman v. *International Bus. Machs. Corp.*, 547 Fed. Appx. 851 (9th Cir. 2013) 30
Clark v. *Martinez*, 543 U.S. 371 (2005) 17
Graham Cnty. Soil & Water Conservation Dist. v. *United States ex rel. Wilson*, 545 U.S. 409 (2005) .....*passim*
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 22
John Beaudette, Inc. v. *Sentry Ins. A Mut. Co.*, 94 F. Supp. 2d 77 (D. Mass. 1999) 30
Merck & Co. v. *Reynolds*, 559 U.S. 633 (2010) 23
Murphy v. *Jefferson Pilot Commc'ns Co.*, 657 F. Supp. 2d 683 (D.S.C. 2008) 30
Ratzlaf v. *United States*, 510 U.S. 135 (1994) 17, 24
Reno v. *Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) 17
Ross v. *Blake*, 136 S. Ct. 1850 (2016) 12
Rumsfeld v. *Padilla*, 542 U.S. 426 (2004) 29
Sherwood v. *Sutton*, 21 F. Cas. 1303 (C.C.D.N.H. 1828) (No. 12,782) 24
United States v. *Bornstein*, 423 U.S. 303 (1976) 3

Cases—Continued: Page

United States ex rel. Eisenstein v. *City of New York*, 556 U.S. 928 (2009) 30
United States ex rel. Hyatt v. *Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996) 14, 25
United States ex rel. Touhy v. *Ragen*, 340 U.S. 462 (1951) 26
Universal Health Servs., Inc. v. *United States ex rel. Escobar*, 136 S. Ct. 1989 (2016) 3, 26
Vermont Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 21, 30

Constitution, statutes, regulations, and rule:

U.S. Const. Art. II, § 2, Cl. 2 28
Act of Mar. 2, 1863, ch. 67, § 7, 12 Stat. 698 3
Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Tit. X, § 1079A(c)(2), 124 Stat. 2079 15
False Claims Act, 31 U.S.C. 3729 *et seq.* 1
31 U.S.C. 3729 ..... 2, 9, 16, 20, 21
31 U.S.C. 3729(a)(1) 1, 2
31 U.S.C. 3729(a)(2)(A) 29
31 U.S.C. 3729(a)(2)(B) 29
31 U.S.C. 3730 (2000) 15
31 U.S.C. 3730 ..... 14, 15, 18
31 U.S.C. 3730(a) 2, 27, 28
31 U.S.C. 3730(b) ..... *passim*
31 U.S.C. 3730(b)(1) 2, 21, 28, 31
31 U.S.C. 3730(b)(2) 2, 21, 24
31 U.S.C. 3730(b)(4) 14, 21
31 U.S.C. 3730(b)(4)(A) 2
31 U.S.C. 3730(b)(4)(B) 2,14, 21
31 U.S.C. 3730(b)(5) 2, 25

Statutes, regulations, and rule—Continued: Page

31 U.S.C. 3730(c)(1) 21
31 U.S.C. 3730(c)(2)(A) 31
31 U.S.C. 3730(c)(2)(A)-(B) 22
31 U.S.C. 3730(c)(3) 2, 14, 21, 22, 31
31 U.S.C. 3730(d)(1) 2, 26, 31
31 U.S.C. 3730(d)(2) 3, 26, 31
31 U.S.C. 3730(e)(2)(A) 22
31 U.S.C. 3730(e)(3) 25
31 U.S.C. 3730(e)(4) 25
31 U.S.C. 3730(e)(4)(A) 22
31 U.S.C. 3730(h) (2000) 15
31 U.S.C. 3730(h) 7, 9, 15, 16
31 U.S.C. 3730(h)(3) 15
31 U.S.C. 3731(b) (1982) 3
31 U.S.C. 3731(b) ..... *passim*
31 U.S.C. 3731(b)(1) ..... *passim*
31 U.S.C. 3731(b)(2) ..... *passim*
31 U.S.C. 3731(c) (2000) 18
31 U.S.C. 3731(d) 17, 18
False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 5, 100 Stat. 3158 ..... 3, 23
28 U.S.C. 510 28
28 U.S.C. 2415 19
28 U.S.C. 2416 19
28 U.S.C. 2416(c) 18, 19
28 C.F.R.:
Pt. 0:
Section 0.45(d) 28
Subpt. Y, App. 28

Regulations and rule—Continued: Page

Pt. 16:

Sections 16.21-16.29 26

Fed. R. Civ. P. 17(a) 30

Miscellaneous:

132 Cong. Rec. (1986):

p. 20,536 23

p. 28,576 27

Civil Division, U.S. Dep't of Justice, *Fraud Statistics – Overview* (2018), https://www.justice.gov/civil/page/ file/1080696/download?utm_medium=email&utm_source=govdelivery 24

False Claims Act Amendments: Hearings before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 99th Cong., 2d Sess. (1986) 3

False Claims Reform Act: Hearing on S. 1562 before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1985) 3

H.R. Rep. No. 660, 99th Cong., 2d Sess. (1986) 23, 24, 27

S. 1562, § 3(1), 99th Cong., 2d Sess. (as reported from the S. Comm. on the Judiciary, July 28, 1986) 27

S. Rep. No. 345, 99th Cong., 2d Sess. (1986) 1, 8, 23, 24, 25, 27

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INTEREST OF THE UNITED STATES

This case presents important questions concerning the time limits for bringing a civil action under the False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.* The FCA is the primary tool by which the federal government combats fraud in federal contracts and programs. The United States has a substantial interest in the proper interpretation of the Act's time limits for bringing suit.

STATEMENT

1. The FCA "has been used more than any other [statute] in defending the Federal treasury against unscrupulous contractors and grantees." S. Rep. No. 345, 99th Cong., 2d Sess. 4 (1986) (1986 Senate Report). The Act imposes civil liability for a variety of deceptive practices involving government funds and property. See 31 U.S.C.

3729(a)(1). A person who violates the Act is liable to the United States for civil penalties plus three times the amount of the government's damages. *Ibid.*

a. A civil action alleging a violation of Section 3729 may be commenced in either of two ways. First, the government may bring a civil action against the alleged violator. 31 U.S.C. 3730(a). Second, a private person (known as a relator) may bring a qui tam civil action "for the person and for the United States Government." 31 U.S.C. 3730(b)(1). In that event, "[t]he action shall be brought in the name of the Government." *Ibid.*

When a relator brings a civil action under Section 3730(b), the complaint is filed in camera and remains under seal for at least 60 days. 31 U.S.C. 3730(b)(2). In addition to filing the complaint under seal, the relator must serve on the government a copy of the complaint and any supporting evidence. *Ibid.* Within 60 days after receiving the complaint and supporting evidence, the government may "intervene and proceed with the action," *ibid.*, "in which case the action shall be conducted by the Government," 31 U.S.C. 3730(b)(4)(A). Alternatively, the government may "notify the court that it declines to take over the action." 31 U.S.C. 3730(b)(4)(B). If the government declines to intervene, the relator has the right to conduct the action. See 31 U.S.C. 3730(b)(4)(B), (b)(5), and (c)(3). But the government is entitled to be served with copies of all pleadings upon request and may intervene at any time with good cause. 31 U.S.C. 3730(c)(3).

If the government intervenes in a civil action brought by a relator under Section 3730(b), the relator is generally entitled to between 15% and 25% of any monetary recovery. 31 U.S.C. 3730(d)(1). If the gov-

ernment declines to intervene and the relator successfully prosecutes the action, the relator receives between 25% and 30% of the recovery. 31 U.S.C. 3730(d)(2).

b. The FCA was enacted in 1863 to "stop[] the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016) (quoting *United States* v. *Bornstein*, 423 U.S. 303, 309 (1976)). The Act originally contained a six-year statute of limitations. Act of Mar. 2, 1863, ch. 67, § 7, 12 Stat. 698; see 31 U.S.C. 3731(b) (1982).

In the course of making significant amendments to the Act in 1986, Congress heard evidence that the six-year limitations period sometimes allowed wrongdoers to escape liability because their frauds remained concealed or otherwise undetected during the limitations period. See *False Claims Act Amendments: Hearings before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 159 (1986) (testimony of Richard K. Willard, Assistant Attorney General, proposing a "limited tolling period where the fraudulent conduct has been concealed, as it frequently is, from the government"); *False Claims Reform Act: Hearing on S. 1562 before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 39 (1985) (prepared statement of Jay B. Stephens, Deputy Associate Attorney General) (similar). To address that concern, Congress added a provision that permitted suit to be filed within three years after the government discovers the fraud, subject to a ten-year outer limit. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 5, 100 Stat. 3158.

In its current form, the Act provides:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. 3731(b).

2. On November 27, 2013, respondent filed his complaint in the present civil action. J.A. 6a, 47a. The complaint alleges that petitioners—two defense contractors—defrauded the United States by submitting false claims for payment under a subcontract to provide security services in Iraq "from some time prior to January 2006 until early 2007." J.A. 43a; see J.A. 19a. In particular, the complaint alleges that the President of Cochise Consultancy had a close personal relationship with a contracting officer in the Army Corps of Engineers, Wayne Shaw, who steered a subcontract to Cochise in exchange for improper gifts and gratuities, and without disclosing the conflict of interest. J.A. 20a-21a.

The government had awarded the Parsons Corporation a $60 million contract to clean up "excess munitions left by retreating or defeated enemy forces." J.A. 33a. Parsons, in turn, solicited bids for a subcontractor to provide security services for the project. J.A. 35a. After a competitive bidding process, a team of Parsons

personnel decided to award the subcontract to a third party. J.A. 36a-37a. Shaw intervened, however, and directed Parsons to award the subcontract to Cochise. J.A. 37a-40a. Respondent worked for Parsons and alleges that he personally observed Shaw's interference. J.A. 24a-25a, 37a-39a.

The complaint further alleges that, as a result of the fraud, the government paid Cochise "in excess of $1 million more per month between February 2006 and September 2006 than it" would have paid if Shaw had not overridden the competitive award. J.A. 40a. The government was also forced to pay an additional $2.9 million for Cochise to acquire armored vehicles necessary to perform the contract. *Ibid.* When Shaw left Iraq, Parsons awarded the subcontract to the third party it had previously selected. *Ibid.*

On November 30, 2010, respondent was interviewed by federal agents about his role in an unrelated contracting fraud in Iraq, for which he ultimately served ten months in prison. Pet. App. 5a. Respondent claims to have told federal agents during the interview about the "fraudulent scheme involving the [Cochise] subcontract for security services." *Ibid.*

In January 2015, the United States declined to intervene in the action, and respondent's complaint was unsealed. J.A. 7a; Pet. App. 6a.

3. In October 2015, petitioners moved to dismiss the complaint as untimely. J.A. 11a; Pet. App. 34a. The parties agreed that the basic six-year limitations period in 31 U.S.C. 3731(b)(1) had elapsed before respondent filed suit on November 27, 2013, given the allegation in the complaint that the fraud had ended in "early 2007." Pet. App. 33a-34a; see J.A. 34a, 43a. Respondent contended, however, that his action was timely under

Section 3731(b)(2) because he had filed his complaint within three years after his November 30, 2010, interview with federal agents (and within ten years after the violation). Pet. App. 34a, 37a.

The district court dismissed the complaint. Pet. App. 32a-40a. The court noted that other courts had adopted "three different interpretations" of Section 3731(b). *Id.* at 35a. Under the first interpretation, Section 3731(b)(2) "simply does not apply" in a qui tam action in which the United States elects not to intervene, *ibid.*, so that any such suit must be filed within six years after the violation. Under the second interpretation, Section 3731(b)(2) applies in non-intervened actions, "but the limitations period runs from the date the relator/plaintiff knew or reasonably should have known of the facts material to the right of action." *Ibid.* Under the third interpretation, Section 3731(b)(2) applies in non-intervened actions, "and the tolling clock does not begin to run until the government knew or should [have known] about the right of action." *Ibid.* The district court rejected the third interpretation and declined to choose between the first two approaches because it found that respondent's complaint would be untimely under either of them. *Id.* at 37a-39a.

4. The court of appeals reversed and remanded. Pet. App. 1a-31a. The court held that Section 3731(b)(2)'s three-year tolling rule applies to qui tam actions in which the United States declines to intervene, *id.* at 14a, and that the proper application of Section 3731(b)(2) in those circumstances turns on the government's knowledge of the fraud, not the relator's, *id.* at 30a.

The court of appeals began "with the words of the statutory provision." Pet. App. 13a (citation omitted). The court noted that both paragraphs (1) and (2) in

Section 3731(b) apply to a "civil action under section 3730." *Id.* at 14a (quoting 31 U.S.C. 3731(b)). The court explained that the plain meaning of that phrase encompasses an FCA suit like this one, because "[a] non-intervened case[] is a type of civil action under § 3730," and "nothing in § 3731(b)(2) says that its limitations period is unavailable to relators when the government declines to intervene." *Ibid.* The court of appeals recognized that in *Graham County Soil & Water Conservation District* v. *United States ex rel. Wilson*, 545 U.S. 409 (2005), this Court had construed the phrase "[a] civil action under section 3730," 31 U.S.C. 3731(b), not to encompass certain claims for retaliation under 31 U.S.C. 3730(h). See Pet. App. 15a-17a. But the court explained that *Graham County* did not directly address the application of Section 3731(b)(2) to non-intervened qui tam actions, *id.* at 17a, and that *Graham County*'s construction of the phrase "civil action under section 3730" to mean "any civil action that has [as] an element a violation of § 3729" would include non-intervened qui tam suits, *id.* at 17a n.8.

The court of appeals rejected petitioners' argument that applying Section 3731(b)(2) in non-intervened qui tam suits would be "absurd." Pet. App. 18a. In the "unique context" of a qui tam action under Section 3730(b)—where a relator sues on behalf of the United States, the government "is entitled to the bulk of the recovery," and the government retains substantial control over the litigation—the court could not "say that it would be absurd for Congress to peg the start of the limitations period to the knowledge of a government official even when the United States declines to intervene." *Id.* at 19a-20a. The court also rejected petitioners' argument that applying Section 3731(b)(2) in non-intervened

qui tam actions would render Section 3731(b)(1) superfluous, noting that relators would still have ample incentive to bring suit within the six-year limitations period. See *id.* at 23a-24a. Finally, the court reviewed the legislative history and found it silent on the key point and generally supportive of reading Section 3731(b)(2) to "encourage more private enforcement suits." *Id.* at 25a (quoting 1986 Senate Report 23-24); see *id.* at 25a-29a.

The court of appeals also observed that "Section 3731(b)(2) is clear that the time period begins to run when 'the official of the United States charged with responsibility to act in the circumstances' knew or reasonably should have known the material facts about the fraud." Pet. App. 30a (quoting 31 U.S.C. 3731(b)(2)). The court held that, because "the text unambiguously identifies a particular official of the United States as the relevant person whose knowledge causes the limitations period to begin to run," it is the government's knowledge rather than the relator's that triggers Section 3731(b)(2)'s three-year tolling provision. *Ibid.*

Finally, the court of appeals held that dismissal of the complaint was unwarranted. Pet. App. 30a-31a. The court held that, although "facts developed in discovery [may] show that the relevant government official knew or should have known the material facts about the fraud at an earlier date," the allegations of the complaint did not show that the suit was untimely. *Id.* at 31a & n.12.

SUMMARY OF ARGUMENT

1. a. The three-year tolling rule in 31 U.S.C. 3731(b)(2) applies to a relator's qui tam action under Section 3730(b) even if the United States declines to intervene in the suit. Petitioner's own timeliness argument depends on the premise that, for purposes of the basic six-year statute of limitations in Section 3731(b)(1),

respondent's qui tam suit is "[a] civil action under section 3730" within the meaning of the introductory clause of Section 3731(b), even though the United States declined to intervene. 31 U.S.C. 3731(b). If that proposition is accepted, the text of Section 3731(b) makes clear that a non-intervened qui tam action is subject to paragraph (2)'s three-year tolling rule as well.

Although petitioners rely in part on *Graham County Soil & Water Conservation District* v. *United States ex rel. Wilson*, 545 U.S. 409 (2005), that decision actually supports the ruling of the court below. In *Graham County*, this Court considered whether a relator's suit under 31 U.S.C. 3730(h) alleging unlawful retaliation was subject to the six-year limitations period in Section 3731(b). The Court held that Section 3731(b) did not apply to a Section 3730(h) suit, but its reasons for reaching that conclusion are inapposite here. The Court in *Graham County* construed the phrase "civil action under section 3730" in Section 3731(b)—the same phrase at issue here—to mean "those civil actions under § 3730 that have as an element a 'violation of section 3729,' that is, §§ 3730(a) and (b) actions." 545 U.S. at 421-422. A non-intervened qui tam suit arises under Section 3730(b) and has as an element a violation of Section 3729.

Petitioners contend (Br. 20 n.3) that a non-intervened qui tam suit is subject to the basic six-year limitations period in Section 3731(b)(1), but not to the three-year tolling rule in Section 3731(b)(2). Within Section 3731(b), however, the term "civil action under section 3730" appears only once, in the provision's introductory clause. 31 U.S.C. 3731(b). Paragraphs (1) and (2) establish distinct (though complementary) timing requirements for such civil actions. A non-intervened suit cannot be a

"civil action under section 3730" for purposes of paragraph (1) but not (2).

b. The FCA's structure, purpose, and history confirm that Section 3731(b)(2) applies in qui tam actions brought under Section 3730(b) even when the United States declines to intervene. Under the FCA, a relator generally can file suit in the same circumstances and under the same terms as the United States, subject to specific and clearly delineated exceptions. Where the Act subjects relator suits to requirements or limitations that do not apply to government actions, it does so expressly. Section 3731(b) does not draw any such distinction, but instead imposes the same timing requirements on all "civil action[s] under section 3730." 31 U.S.C. 3731(b). That reading also accords with the purpose of the tolling provision. Congress recognized that fraud is often difficult to detect, and it enacted the tolling provision to prevent wrongdoers from benefiting when the government does not discover their frauds before the basic six-year limitations period expires. Nothing in the legislative record suggests that Congress intended to shield wrongdoers from the tolling rule when the United States relies on a relator to prosecute an action.

c. Petitioners' policy concerns are unfounded. Even if the tolling rule in Section 3731(b)(2) applies to non-intervened qui tam suits, private relators will have substantial incentives to report fraud to the government and to file suit expeditiously. Relators who strategically delay filing suit risk being barred from doing so by an earlier private plaintiff, a government action, or a public disclosure of the fraud. Petitioners' concern that the application of Section 3731(b)(2) in non-intervened suits would require burdensome discovery is overstated and does not justify disregarding the plain text of the statute.

2. Under Section 3731(b)(2), the "official of the United States charged with responsibility to act in the circumstances"—the person whose knowledge is relevant for tolling purposes—is always a government official, whether or not the United States elects to intervene. 31 U.S.C. 3731(b)(2). A private relator is not an "official of the United States" in any sense of that term. The relator does not hold an office, receive an appointment or commission, or otherwise exercise any delegated sovereign authority. Nor is a private relator a person "charged with responsibility to act in the circumstances" where evidence of FCA violations comes to light.

Petitioners' contrary view cannot be reconciled with the statutory text, and it would produce bizarre results. Under that approach, a relator's qui tam suit could be timely even though a government suit filed on the same day and alleging the same fraudulent acts would not be. To allow a qui tam suit in that scenario is contrary to the basic logic of the FCA's qui tam mechanism, under which a relator acts as a partial assignee of the government to assert the same claims that the government might have advanced.

ARGUMENT

I. SECTION 3731(b)(2) APPLIES TO A RELATOR'S ACTION UNDER SECTION 3730(b) EVEN IF THE UNITED STATES DECLINES TO INTERVENE IN THE ACTION

The timing rules in 31 U.S.C. 3731(b), including the three-year tolling rule in Section 3731(b)(2), apply to "[a] civil action under section 3730." 31 U.S.C. 3731(b). In *Graham County Soil & Water Conservation District* v. *United States ex rel. Wilson*, 545 U.S. 409 (2005), this Court construed that phrase to mean "those civil actions under § 3730 that have as an element a 'violation of section 3729,' that is, §§ 3730(a) and (b) actions," *id.* at 421-

422. Relator suits like this one arise under Section 3730(b), which is entitled "Actions By Private Persons" and authorizes private plaintiffs to bring suit "for a violation of section 3729." 31 U.S.C. 3730(b). A qui tam suit therefore falls squarely within the plain language of Section 3731(b), and within this Court's construction of that language in *Graham County*, whether or not the United States intervenes in the action.

In petitioners' view (Br. 20 n.3), a qui tam suit in which the United States does not intervene is a "civil action under section 3730" for purposes of Section 3731(b)(1)'s basic six-year limitations period, but not for purposes of Section 3731(b)(2)'s tolling rule. But the term "civil action under section 3730" appears only once, in Section 3731(b)'s introductory clause. That term cannot plausibly be thought to have two different meanings depending on which aspect of Section 3731(b)'s timing rules is at issue. Petitioners' reading is also inconsistent with the structure, purpose, and history of the statute. Under the correct interpretation of Section 3731(b), a relator's suit is timely if, but only if, the government could have brought the same suit at the same time.

A. The Text Of Section 3731(b) Does Not Distinguish Among FCA Suits Commenced By The United States, Qui Tam Suits In Which The United States Intervenes, And Qui Tam Suits In Which The United States Declines To Intervene

"Statutory interpretation * * * begins with the text," *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016), and the text of Section 3731(b) fully resolves this case. A qui tam suit brought under Section 3730(b) is a "civil action under section 3730," 31 U.S.C. 3731(b), and is therefore subject to both the basic six-year statute of limitations

in Section 3731(b)(1) and the three-year tolling rule in Section 3731(b)(2).

1. A civil action brought by a relator for a violation of Section 3729 is "[a] civil action under section 3730"

Section 3731(b) specifies that "[a] civil action under section 3730 may not be brought" if the action falls outside of the periods described in paragraphs (1) or (2), "whichever occurs last." 31 U.S.C. 3731(b). Paragraph (1) is a conventional six-year statute of limitations, while paragraph (2) is the tolling provision at issue here:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

Ibid. The statute is thus drafted so that both paragraphs (1) and (2) apply to "[a] civil action under section 3730." *Ibid.*

As the court of appeals recognized, an action by a relator in which the United States declines to intervene is a "civil action under section 3730." Pet. App. 14a. In particular, Section 3730(b) authorizes a relator to "bring a civil action for a violation of section 3729 for the [relator] and for the United States * * * in the name of the Government." 31 U.S.C. 3730(b). The government

may intervene in any such action, but it is not required to do so. 31 U.S.C. 3730(b)(4). When the government declines to intervene, the relator "bringing the action shall have the right to conduct the action." 31 U.S.C. 3730(b)(4)(B); see 31 U.S.C. 3730(c)(3) (similar). But whether or not the government intervenes, the civil action remains at all times an action under Section 3730, and it is therefore subject to both paragraphs (1) and (2) in Section 3731(b).

Petitioners argue (Br. 18) that "Section 3731(b)(2) does not expressly mention relators." But Section 3731(b)(1) likewise does not expressly mention relators. Instead, the operative language that makes both paragraphs (1) and (2) applicable to qui tam suits is the introductory clause, which specifies that the timing rules apply to "[a] civil action under section 3730." 31 U.S.C. 3731(b). Petitioners also argue that paragraph (2)'s reference to "the official of the United States charged with responsibility to act in the circumstances" indicates that Congress did not intend for paragraph (2) to apply when the government elects not to intervene. Pet. Br. 18 (citation omitted). But that clause merely specifies whose knowledge counts in applying the discovery rule in paragraph (2); it does not modify or limit the actions to which paragraph (2) applies. "Indeed, there is nothing in the entire statute of limitations subsection which differentiates between private and government plaintiffs at all." *United States ex rel. Hyatt* v. *Northrop Corp.*, 91 F.3d 1211, 1214 (9th Cir. 1996).

2. This Court's decision in* Graham County *confirms that Section 3731(b)(2) applies to this case

The question presented in *Graham County* was whether the six-year limitations period in Section 3731(b)(1) "governs * * * actions for retaliation" under

Section 3730(h). 545 U.S. at 411. When *Graham County* was decided, Section 3730(h) created a cause of action for any "employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment" for taking lawful steps to further or assist "an action filed or to be filed" under Section 3730. 31 U.S.C. 3730(h) (2000). Section 3730(h) did not specify a time limit for bringing such an action. See *ibid.*[1]

This Court held that an action under Section 3730(h) alleging unlawful retaliation was not a "civil action under section 3730" for purposes of Section 3731(b), and that the time for filing such a suit therefore was governed not by the FCA's six-year limitations period, but by federal common law, which borrows an analogous state-law period. *Graham County*, 545 U.S. at 422. The Court concluded that, although an action under Section 3730(h) is literally a "civil action under section 3730," the statutory "context" indicated that Section 3731(b) applies "only to actions arising under §§ 3730(a) and (b), not to § 3730(h) retaliation actions." *Id.* at 415. The Court therefore held that the phrase "'civil action under section 3730' means only those civil actions under § 3730 that have as an element a 'violation of section 3729,' that is, §§ 3730(a) and (b) actions." *Id.* at 421-422.

The Court identified two primary bases for that conclusion. First, while the six-year limitations period begins to run when "the violation of section 3729 is committed," 31 U.S.C. 3731(b)(1), Section 3730(h) protects

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[1] Congress later amended Section 3730(h) to add a three-year statute of limitations. See 31 U.S.C. 3730(h)(3); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Tit. X, § 1079A(c)(2), 124 Stat. 2079.

employees from retaliation for assisting in an investigation even when no violation of Section 3729 has occurred. See *Graham County*, 545 U.S. at 416. Second, an employee's cause of action under Section 3730(h) accrues only when the retaliation occurs, which may be more than six years after any violation of Section 3729. See *id.* at 418. Applying Section 3731(b)(1) to Section 3730(h) suits therefore would violate "the default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues," *ibid.*, and could cause some retaliation claims to become time-barred before they even accrue, *id.* at 421.

Contrary to petitioners' contention (Br. 17), *Graham County*'s "interpretive approach" does not support their reading of Section 3731(b)(2). Although the Court interpreted the phrase "[a] civil action under section 3730" in Section 3731(b) to "refer only to a subset of § 3730 actions," *Graham County*, 545 U.S. at 418, respondent's suit is squarely within the subset the Court identified, *i.e.*, "civil actions under § 3730 that have as an element a 'violation of section 3729,'" *id.* at 421-422. Civil actions brought by relators under Section 3730(b) have as an element a violation of Section 3729, whether or not the government intervenes. See 31 U.S.C. 3730(b) (authorizing a private person to "bring a civil action for a violation of section 3729"). And, for that reason, treating a non-intervened qui tam suit as a "civil action under section 3730" does not create the practical anomalies that the Court in *Graham County* identified.

Finally, the Court in *Graham County* held that a retaliation claim under Section 3730(h) is not (for limitations purposes) a "civil action under section 3730" *at all*, and therefore is not subject *either* to Section 3731(b)(1)'s basic six-year limitations period *or* to Section 3731(b)(2)'s

tolling rule. Petitioners, by contrast, would treat respondent's qui tam suit as a "civil action under section 3730" for purposes of the six-year deadline, but not for tolling purposes. Nothing in *Graham County* supports that approach.

3. Petitioners' textual arguments lack merit

a. In petitioners' view (Br. 39), a qui tam action in which the United States declines to intervene is subject to the six-year limitations period in Section 3731(b)(1), but not to the three-year tolling rule in Section 3731(b)(2). Yet both those provisions apply to "[a] civil action under section 3730." 31 U.S.C. 3731(b). A non-intervened suit cannot simultaneously be a "civil action under section 3730" for purposes of Section 3731(b)(1) but not (b)(2), since the "*same* * * * provision" of a statute cannot "bear[] two different meanings" at the same time. *Clark* v. *Martinez*, 543 U.S. 371, 380, 383 (2005); see *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000) ("[W]e refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying.") (citing *Bankamerica Corp.* v. *United States*, 462 U.S. 122, 129 (1983)); *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears. We have even stronger cause to construe a *single* formulation * * * the same way each time it is called into play.") (citation omitted).

Petitioners' reliance (Br. 19-20) on 31 U.S.C. 3731(d) is thus misplaced. Section 3731(d) states: "In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence." 31 U.S.C. 3731(d). The United States has

nothing to prove in a relator's action under Section 3730(b) in which the government has declined to intervene. In *Graham County*, this Court accordingly recognized that the "context of this provision" (which at the time was codified as Subsection (c), see Pet. Br. 19 n.2) implies that the phrase "any action brought under section 3730" as used in Section 3731(d) "refer[s] only to a subset of § 3730 actions"—specifically, to those actions that are "brought by the United States" or in which "the United States intervenes as a party." 545 U.S. at 418.

That is not, however, the interpretation petitioners urge here. If the phrase "[a] civil action under section 3730" in Section 3731(b)'s introductory clause referred only to the subset of Section 3730 actions that are brought by the United States or in which the United States intervenes, see *Graham County*, 545 U.S. at 418, then a non-intervened suit would be subject to neither the tolling rule in Section 3731(b)(2) nor the basic six-year limitations period in Section 3731(b)(1)—a result petitioners expressly repudiate (Br. 20 n.3). Petitioners suggest (*ibid.*) that the phrase "[a] civil action under section 3730" is "used in Section 3731(b)(1)." But it is not. That phrase appears only in Section 3731(b)'s introductory clause and describes the set of actions to which both paragraphs (1) and (2) apply. Petitioners' position thus would require giving the same phrase two different meanings in a non-intervened action—a textual aberration that *Graham County* did not countenance and that Section 3731(d) does not support.

b. Petitioners argue (Br. 20-21) that Congress modeled Section 3731(b)(2) on 28 U.S.C. 2416(c); that Section 2416(c) "applies only to suits brought by the government"; and that Section 3731(b)(2) should therefore be read the

same way. Section 2416(c) states that the applicable statute of limitations should be tolled when "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances." 28 U.S.C. 2416(c). But Congress did not import into Section 3731(b)(2) the specific language that limits Section 2416(c) to suits by the government.

Section 2416(c) applies only "[f]or the purpose of computing the limitations periods established in section 2415," 28 U.S.C. 2416, and Section 2415 in turn establishes the "[t]ime for commencing actions brought by the United States," 28 U.S.C. 2415. As the court below explained, the "language in § 2416" that Congress incorporated into the FCA "is not what specifies that a limitations period in § 2415 applies only when the United States is a party," because "§ 2415 itself dictates that the United States must be a party for its limitations period to apply." Pet. App. 27a-28a. Section 3731(b)(2), by contrast, establishes a tolling rule not for suits "brought by the United States," or suits "to which the United States is a party," but for "[a] civil action under section 3730"—a term that encompasses respondent's non-intervened qui tam suit.

c. Petitioners argue (Br. 18-19, 22-26) that "default" common-law rules would preclude a relator from benefiting from tolling the statute of limitations when the United States is not a party to the action, and that Congress must speak clearly to displace those default rules. But petitioners do not identify any common-law rule regarding tolling in qui tam actions, and none of the statutes or decisions they cite (Br. 23-25 & nn.4-5) addresses those circumstances. In any event, Congress

did speak clearly in establishing a tolling rule that encompasses non-intervened qui tam suits. The three-year tolling rule applies to any "civil action under section 3730," 31 U.S.C. 3731(b), and a non-intervened qui tam suit is such a civil action.

d. Petitioners argue (Br. 27-28) that reading Section 3731(b)(2) to apply in non-intervened qui tam suits would render Section 3731(b)(1) largely superfluous in such cases, "effectively nullifying one of the two limitations provisions." Petitioners' argument rests on the premise (Br. 28) that cases in which "the government learn[s] about the fraud within the first three years of its occurrence * * * are likely to be rare." Petitioners identify no sound basis for that assertion. And if the government rarely learned of fraud within the first three years after its occurrence, Section 3731(b)(1)'s basic six-year statute of limitations would seldom control the timeliness inquiry in *government-initiated* suits either. In any event, petitioners' speculation provides no basis for disregarding the clear statutory language.

B. The Structure, Purpose, And History Of The Statute Confirm That Section 3731(b)(2) Applies Even When The United States Declines To Intervene

The general thrust of the FCA's qui tam provisions is to allow private relators to sue in any circumstance where the United States could bring its own enforcement action alleging a violation of Section 3729. When Congress wishes to depart from that general approach, by subjecting relator suits to restrictions that do not apply to government actions, it has expressed that intent explicitly. The tolling provision in Section 3731(b)(2) contains no such distinction. Moreover, Section 3731(b)(2) was enacted to ensure that FCA violators do not benefit

when their fraud does not come to light during the limitations period, and petitioners' reading would frustrate that purpose. The legislative history confirms the purpose of the tolling provision, and it does not suggest that Members of Congress intended to shield wrongdoers from the tolling rule when the United States relies on a relator to prosecute an action under Section 3730(b).

1. Where the FCA distinguishes between relators and the government, it does so clearly

a. The structure of the FCA reinforces the conclusion that Section 3731(b)(2)'s tolling rule applies to non-intervened qui tam suits. The Act permits a relator to bring an action "in the name of the Government," 31 U.S.C. 3730(b)(1), for an injury "suffered by the United States," *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). If the government declines to intervene, the relator "conduct[s] the action," 31 U.S.C. 3730(b)(4)(B) and (c)(3), and enforces the same substantive antifraud prohibitions that the United States enforces when it brings suit or intervenes, see 31 U.S.C. 3729. The general thrust of the Act's qui tam provisions thus is to allow a relator to commence and pursue an FCA suit in the same circumstances where the government can pursue its own enforcement action.

When Congress wishes to subject private relators to restrictions that do not apply to the government, it has enacted explicit statutory language to accomplish that objective. A relator must file his complaint under seal and cannot proceed with the action until the government has had an opportunity to consider intervening. 31 U.S.C. 3730(b)(2) and (4). If the government intervenes, the FCA carefully delineates the government's rights to control the action. 31 U.S.C. 3730(c)(1) and

(2)(A)-(B). The Act also specifies in detail the respective rights of the relator and the government in cases where the government does *not* intervene. *E.g.*, 31 U.S.C. 3730(c)(3); see pp. 2-3, *supra*. Other FCA provisions explicitly preclude qui tam suits, but not government enforcement actions, under specified circumstances. See, *e.g.*, 31 U.S.C. 3730(e)(2)(A) and (4)(A).

Section 3731(b)(2), by contrast, does not distinguish between relators and the government. To the contrary, Section 3731(b)(2)'s tolling rule, like the basic six-year statute of limitations contained in Section 3731(b)(1), applies to any "civil action under section 3730." 31 U.S.C. 3731(b). In light of the express distinctions drawn elsewhere in the FCA, to construe Section 3731(b)(2) as implicitly distinguishing between intervened and non-intervened suits would violate the presumption that "Congress acts intentionally and purposefully" when it includes "particular language in one section of a statute but omits it in another." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (citations omitted).

b. Reading Section 3731(b)(2) to apply to qui tam actions in which the United States does not intervene also accords with the FCA's structure by ensuring that, for timing purposes, the relator is in the same shoes as the government. If an action by the government would be time-barred, so too would a similar action by a private relator. If an action by the government would be timely, so too would a similar action by a private relator.

Petitioners assert (Br. 26-27) that reading Section 3731(b)(2) to apply in non-intervened suits would give relators "a longer period to sue than the government in some scenarios where a relator and the government are similarly situated." Petitioners' point is that, in cases like this one, where a relator learns of an alleged fraud

before the government does, the court of appeals' interpretation of Section 3731(b)(2) allows the relator to sue more than three years after the relator himself learned of the fraud. By that standard, however, Section 3731(b)(1)'s basic six-year limit would also give relators who learn of an alleged fraud before the government does "a longer period to sue than the government." Pet. Br. 26. In devising a statute of limitations for FCA suits, Congress instead adopted a different form of parallel treatment, under which a qui tam suit is timely if, but only if, a government suit filed on the same day and alleging the same violation would be timely.

2. Petitioners' reading would frustrate the purpose of the tolling provision

Congress added Section 3731(b)(2) to the FCA in 1986, in the course of making significant amendments to the Act. See False Claims Amendments Act of 1986, § 5, 100 Stat. 3158; Resp. Br. 8-9, 45-47; p. 3, *supra*. The tolling provision was drafted to ensure that wrongdoers do not escape liability simply because their frauds go undetected by the government during the six-year limitations period. See 1986 Senate Report 15 (fraud "is, by nature, deceptive" and may be obscured by the "wrongdoer's successful deception"); cf. H.R. Rep. No. 660, 99th Cong., 2d Sess. 25 (1986) (1986 House Report) ("fraud is often difficult to detect"); 132 Cong. Rec. 20,536 (1986) (the "tolling provision [should] be liberally construed because the conduct addressed here is so inherently deceptive and carefully concealed" (statement of Sen. Grassley)). Like other discovery rules, Section 3731(b)(2) thus serves to prevent the limitations period from becoming "the means by which [the defendant's fraud] is made successful and secure." *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 644 (2010) (quoting *Bailey* v.

Glover, 88 U.S. (21 Wall.) 342, 349 (1875)); see *Sherwood* v. *Sutton*, 21 F. Cas. 1303, 1307 (C.C.D.N.H. 1828) (No. 12,782) (Story, J.).

Petitioners' reading would contravene the purpose of the tolling provision by making it inapplicable to many civil FCA suits. For a variety of reasons, the United States intervenes in only about one-quarter of qui tam actions, which in turn significantly outnumber the actions brought by the government. See Pet. App. 9a n.4, 12a n.6; Civil Division, U.S. Dep't of Justice, *Fraud Statistics – Overview* 1-2 (2018), https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery. Petitioners' reading would thus allow many wrongdoers to escape liability by concealing their frauds for six years and then asserting the statute of limitations to bar a qui tam suit, even when the suit is filed within three years after the government learns of the fraud.

3. The legislative history of the statute supports giving effect to its plain meaning

This Court need not "resort to legislative history to cloud a statutory text that is clear." *Ratzlaf*, 510 U.S. at 147-148. But, to the extent that the legislative history of the 1986 FCA amendments sheds any light on the question presented here, it confirms that Section 3731(b)(2)'s tolling rule was intended to prevent wrongdoers from benefiting when their frauds are concealed. See pp. 3, 23, *supra*. The amendments also had an overall goal of "encourag[ing] more private enforcement suits." 1986 Senate Report 23-24. Applying Section 3731(b)(2) in non-intervened qui tam suits furthers both of those purposes.

Petitioners argue (Br. 37-39) that the legislative history reflects an exclusive concern with suits by the government itself. See, *e.g.*, 1986 House Report 25 ("[T]he

statute of limitations should not preclude *the Government* from bringing a cause of action under this Act if they were not aware of the fraud.") (emphasis added). But "the legislative history of the Act is replete with many instances in which the word 'government' is used when referring to suits brought in the name of the United States by either the Attorney General or private qui tam plaintiffs." *Hyatt*, 91 F.3d at 1214. "For example, in discussing the scienter requirement, the committee reports refer to evidence which the 'government' must offer." *Id.* at 1214-1215 (quoting 1986 Senate Report 6-7). "Given this history," the absence of specific references to relators in the legislative discussions of tolling "is a weak rationale to support a decision contrary to the plain meaning of the statute." *Id.* at 1215.

C. Petitioners' Policy Concerns Are Unfounded

1. Petitioners speculate (Br. 28-31) that applying Section 3731(b)(2) to non-intervened suits will create an incentive for relators with knowledge of actionable fraud to delay bringing suit while potential damages accumulate, in order to maximize their recoveries. That concern is unrealistic, however, given the many FCA provisions that "create strong incentives to ensure that relators promptly report fraud." Pet. App. 23a. If a prospective relator delays filing suit, a second relator or the government may sue first and preempt the relator's claim, see 31 U.S.C. 3730(b)(5) (first-to-file bar) and (e)(3) (government-action bar); or the alleged fraud may be "publicly disclosed" by another source in the interim, likewise barring suit. 31 U.S.C. 3730(e)(4). Under the correct interpretation of the Act, moreover, the three-year tolling provision runs from the date "when facts material to the right of action are known or reasonably should have been known by" the government. 31 U.S.C.

3731(b)(2). A prospective relator who does not report a fraud to the government and instead delays filing suit runs the risk that the tolling period will expire sooner than expected because the government has learned of the fraud from another source.

A prospective relator also must carry his burden of proof in order to obtain any recovery at all. A relator who "wait[s] to sue 'until evidence has been lost, memories have faded, and witnesses have disappeared,'" Pet. Br. 30 (quoting *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 554 (1974)), will have a more difficult time establishing liability and recovering damages even if the defendant remains solvent. And even where a relator successfully prosecutes a qui tam action, a district court may take into account any dilatory conduct in determining the relator's share of the recovery. See 31 U.S.C. 3730(d)(1) and (2) (allowing adjustments to the relator's share in intervened and non-intervened cases).

2. Petitioners assert (Br. 32-33) that applying the tolling provision in non-intervened suits will entail intrusive discovery into the government's knowledge of the fraud—*i.e.*, into when, if ever, the responsible government official knew or should have known the "facts material to the right of action." 31 U.S.C. 3731(b)(2). That concern does not justify disregarding the plain text of the statute. The government's knowledge or lack thereof could be established by affidavit, and the ability of private parties to obtain civil discovery from the government as a non-party is limited. See *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462, 468-469 (1951); cf. 28 C.F.R. 16.21-16.29 (Department of Justice *Touhy* regulations).[2]

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[2] The court of appeals also explained that private parties in non-intervened suits may seek to put the government's knowledge at issue for other reasons. See Pet. App. 22a n.10; cf. *Universal Health*

II. UNDER SECTION 3731(b)(2), A PRIVATE RELATOR IS NEVER "THE OFFICIAL OF THE UNITED STATES" WHOSE KNOWLEDGE OF FRAUD TRIGGERS THE COMMENCEMENT OF THE THREE-YEAR TOLLING PERIOD

Section 3731(b)(2)'s tolling period begins to run when "the official of the United States charged with responsibility to act in the circumstances" knew or reasonably should have known about the fraud. 31 U.S.C. 3731(b)(2). Whether or not the government intervenes in a particular qui tam suit, that tolling period is triggered by the knowledge of the relevant government official, not by the knowledge of the private relator.

A. For purposes of "act[ing] in the circumstances," 31 U.S.C. 3731(b)(2)—*i.e.*, determining the appropriate governmental response to evidence of FCA violations—the relevant government official is an officer of the Department of Justice.[3] The FCA states that the Attorney General "diligently shall investigate a violation of section 3729" and "may bring a civil action" under Section

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Servs., Inc. v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016) ("[I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.").

[3] Congress considered a version of the tolling provision that would have made this explicit. See S. 1562, § 3(1), 99th Cong., 2d Sess. (as reported from the S. Comm. on the Judiciary, July 28, 1986) ("when facts material to the right of action are known * * * by the official *within the Department of Justice* charged with responsibility to act") (emphasis added); cf. 1986 Senate Report 15 (noting that the proposed tolling provision would depend on "when the Government learned of a violation"). In settling on the present language, see 1986 House Report 4-5; 132 Cong. Rec. 28,576, there is no indication that Congress wished to expand the relevant universe of officials beyond the Department of Justice—let alone to private relators.

3730(a). 31 U.S.C. 3730(a). The Attorney General has delegated his authority to the Assistant Attorney General for the Civil Division, 28 C.F.R. 0.45(d); see 28 U.S.C. 510, who in turn has re-delegated that authority in some circumstances to other subordinate officials within the Department. See 28 C.F.R. Pt. 0, Subpt. Y, App. 85-86 (Civil Div. Directive No. 1-15). The Assistant Attorney General or his delegate therefore is "the official of the United States charged with responsibility to act" for purposes of Section 3731(b)(2).

B. A private relator, by contrast, is not an "official of the United States." A private relator is not appointed in the manner of officers of the United States, see U.S. Const. Art. II, § 2, Cl. 2, or even employed by the United States. Because a relator does not hold an office, receive an appointment or commission, or otherwise exercise any delegated sovereign authority, he does not satisfy the definitions of "official" that petitioners cite (Br. 41 n.8). The government also does not "deputize[ ]"any particular relator to bring any particular action. Pet. Br. 41 (citation omitted). Consistent with those facts, the FCA provision that authorizes qui tam suits is entitled "Actions By Private Persons." 31 U.S.C. 3730(b).

A private relator also is not the person "charged with responsibility to act in the circumstances" where evidence of FCA violations comes to light. 31 U.S.C. 3731(b)(2). Under Section 3730(b)(1), a private person who learns of FCA violations and satisfies the statutory prerequisites is entitled to file suit "for the person and for the United States Government." 31 U.S.C. 3730(b)(1). Nothing in the FCA or in any other federal law, however, purports to *require* such a person to commence a qui tam suit. Rather, the person "charged with

responsibility to act in the circumstances" is the Department of Justice officer whose official *duties* include the investigation and remediation of a particular fraud.[4]

C. That reading is confirmed by Section 3729(a)(2)(A), which uses similar language in a manner that could not sensibly be read to describe relators. Under that provision, a defendant's damages liability for a particular false claim may be reduced if the defendant self-reported the violation within 30 days to "officials of the United States responsible for investigating false claims." 31 U.S.C. 3729(a)(2)(A). The violator must also "cooperate[] with any Government investigation" after self-reporting. 31 U.S.C. 3729(a)(2)(B). That provision reflects the evident understanding that the "officials of the United States" who are "responsible for investigating false claims," and to whom a violator must self-report in order to qualify for reduced damages, are government officials.

Petitioners' reading would also produce "textual anomal[ies]" and "counterintuitive results." *Graham County*, 545 U.S. at 416, 421. In this case, petitioners argue that respondent's suit was time-barred even though a government suit filed on the same day would have been timely under Section 3731(b)(2). In cases where the government learns of a fraud *first*, however, petitioners' approach would allow a qui tam suit to go forward even though a government suit filed on the same

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[4] Section 3731(b)(2)'s use of the definite article—"*the* official of the United States," 31 U.S.C. 3731(b)(2) (emphasis added)—"indicates that there is generally only one proper" official. *Rumsfeld* v. *Padilla*, 542 U.S. 426, 434 (2004). It is particularly farfetched to suppose that respondent was the *only* person "charged with responsibility to act in the circumstances" when he first learned of petitioners' alleged fraud, nearly three years before the present qui tam suit was filed.

day would be time-barred. See Pet. Br. 44-45. Since a relator sues as, in effect, "a partial assign[ee] of the Government's damages claim," *Stevens*, 529 U.S. at 773, it would be anomalous to allow a relator to sue on a claim that the government as assignor was time-barred from asserting. Petitioners' reading further implies that, if a relator brings suit in those circumstances and the government intervenes, the suit will be untimely after all, since on petitioners' view Section 3731(b)(2) makes the knowledge of the relator dispositive only in *non-intervened* qui tam actions. Nothing in the FCA indicates that Congress contemplated a subset of qui tam actions in which the United States is effectively barred from intervening.

D. Petitioners contend (Br. 43) that, "[u]nder the Eleventh Circuit's decision, * * * the timeliness of a relator's suit would not depend on the factors relevant under default tolling principles—the plaintiff's knowledge and diligence—but on whether and when the government learned of the fraud." But even in a qui tam suit where the government declines to intervene, "the United States is a 'real party in interest' in a case brought under the FCA." *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 930 (2009) (quoting Fed. R. Civ. P. 17(a)). The gravamen of an FCA qui tam suit is that the defendant has committed a legal wrong *against the government*, and the relator acts as "a partial assign[ee]" of the United States' claim. *Stevens*, 529 U.S. at 773.[6] Even

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[6] Petitioners are wrong to suggest (Br. 43 n.9) that any well-established background rule governs the application of tolling and discovery rules to assigned claims. Compare *John Beaudette, Inc.* v. *Sentry Ins. A Mut. Co.*, 94 F. Supp. 2d 77, 109 (D. Mass. 1999) (looking to the assignor's knowledge), and *Murphy* v. *Jefferson Pilot Commc'ns Co.*, 657 F. Supp. 2d 683, 692 (D.S.C. 2008) (same), with *Bierman* v. *International Bus. Machs. Corp.*, 547 Fed. Appx.

when the government initially declines to intervene, it can (among other prerogatives) object to the relator's proposed settlement and voluntary dismissal of the suit, 31 U.S.C. 3730(b)(1); dismiss the case, 31 U.S.C. 3730(c)(2)(A); intervene later in the proceedings for good cause shown, 31 U.S.C. 3730(c)(3); and receive the bulk of any monetary recovery the suit produces, 31 U.S.C. 3730(d)(1) and (2). Given the government's continuing interest in a non-intervened qui tam suit, there is nothing anomalous about Congress's decision to craft a tolling rule that turns on the government's knowledge rather than on the relator's.

Petitioners' argument suggests at the very most that, if Congress had left it to courts to apply common-law tolling principles to the idiosyncratic cause of action that a relator pursues in a non-intervened qui tam suit, the choice of a proper tolling rule would not be free from doubt. Congress obviated the need for such an inquiry, however, by specifying that the availability of tolling turns on the knowledge of "the official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. 3731(b)(2). Petitioners' speculation that common-law tolling principles would support a different rule provides no basis for disregarding the clear import of the statutory text.

851, 852 (9th Cir. 2013) (looking to the knowledge of both the assignor and assignee).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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